FILE COPY

FILED
OCT 4 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 366

IRVING POTASH,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

LEE PRESSMAN,
JOSEPH FORER,
DAVID REIN,
CAROL KING,
ISIDORE ENGLANDER,
DAVID FREEDMAN,
IRA GOLLOBIN,
WILLIAM L. STANDARD,
Attorneys for Petitioner.

INDEX

	Page
Opinions Below	2
Summary Statement of Matter Involved	2
Jurisdiction	4
Questions Presented	4
Statutes Involved	5
Reasons for Granting the Writ	9
I. Why the Issues Require Review	9
A. Importance of the Issues	9
B. Erroneous Rulings by Courts of Appeals	11
1. Application of Section 7(a) of the Administrative Procedure Act	11
2. Application of Section 5 of the Act	15
II. Why the Issues Should be Reviewed in This Case Prior to Decision of the Court of Appeals	17
Conclusion	20

Cases Cited

AFL v. *Watson*, 327 U. S. 582	16
Atlantic Coast Line R. R. v. *Goldsboro*, 232 U. S. 548	16
Azzollini v. *Watkins*, 172 F. (2d) 897	12
Bersoff v. *Donaldson*, App. D. C., Jan. 3, 1949	17
Bridges v. *Wixon*, 326 U. S. 135	10, 18
Delgadillo v. *Carmichael*, 332 U. S. 388	10
Eisler v. *Clark*, 77 F. Supp. 610	2
Ex parte Bernat, 255 F. 429	18
Fong Haw Tan v. *Phelan*, 333 U. S. 6	10
Graham v. *U. S.*, 99 F. (2d) 746	13
Griffen v. *Cole*, 60 Ariz. 83, 131 P. (2d) 989	16
Hamilton v. *University*, 293 U. S. 245	16
Japanese Immigrant Case, 189 U. S. 86	16
King Mfg. Co. v. *Augusta*, 277 U. S. 100	16
Kirkland v. *Atlantic Coast Line R. Co.*, 167 F. (2d) 529	17

Page

Kwock Jan Fat v. *White*, 253 U. S. 454 16
Phillips v. *U. S.*, 312 U. S. 246 16
U. S. ex rel. Potash v. *District Director*, 169 F. (2d) 747 4
U. S. ex rel. Trinler v. *Carusi*, 166 F. (2d) 457 17
Wong Yang Sung v. *Clark & Miller*, App. D. C. April 4, 1949; U. S. Sup. Ct., No. 154, Oct. Term 1949 ... 11, 12

STATUTES AND REGULATIONS

Administrative Procedure Act:

Section 5, 5 U.S.C. 1004 ..... 3, 4, 5, 14, 15
Section 7, 5 U.S.C. 1006 ..... 3, 4, 5, 12, 14, 15
Section 8, 5 U.S.C. 1007 ..... 3, 4, 6, 15
Section 11, 5 U.S.C. 1001 ..... 3, 4, 6, 15
Immigration Act of 1917, sec. 24, 8 U.S.C. 109 14
Immigration Act of 1917, sec. 16, 8 U.S.C. 152 . 7, 12, 13, 14
8 U.S.C. 137 ..... 2, 18, 19
8 C.F.R. 60.27 15
28 U.S.C. 1254(1) 4

MISCELLANEOUS

Sen. Rep. No. 752, 79th Cong., 1st Sess. 10
Sen. Doc. 248, 79th Cong., 2d Sess. 10, 14, 16, 17
H. R. Rep. No. 1980, 79th Cong., 2d Sess. 16
The Sunday Star, Wash., D. C., Aug. 8, 1948 10
Report of the Secretary of Labor's Committee on Administrative Procedure (The Immigration and Naturalization Service), by Dimock, Hart and McIntire (1940) 13
Note, Federal Administrative Procedure Act, 56 Yale L. J. 670 11
58 Yale L. J. 701 14
49 Col. L. Rev. 73 17
Enforcement of the Deportation Laws, 5 National Commission on Law Observance (Wickersham Commission) (1931) 11
Attorney General's Manual on the Administrative Procedure Act (1947) 72 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 366

IRVING POTASH,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Irving Potash prays that a writ of certiorari issue to bring up to this Court a case pending in the United States Court of Appeals for the District of Columbia Circuit, wherein the respondents have on appeal a judgment of the United States District Court for the District of Columbia granting petitioner an injunction which restrains the respondents from deporting or seeking to deport petitioner by proceedings which do not comply with provisions of the Administrative Procedure Act.

Opinion Below

No opinion was issued by the District Court in connection with its final judgment. However, the opinion of the District Court (Goldsborough, J.), issued in connection with its earlier order granting a preliminary injunction in five cases, including petitioner's, is reported *sub nom. Eisler* v. *Clark*, in 77 F. Supp. 610.

Summary Statement of Matter Involved

On March 22, 1948, petitioner filed a complaint for injunction and declaratory judgment against the Attorney General of the United States and the Commissioner of Immigration and Naturalization (R. 22).

The complaint alleged the following: Petitioner has been a resident of the United States for approximately 35 years, his entire adult life. He is married to an American citizen and has an American-born daughter. He is vice-president of the International Fur and Leather Workers Union (CIO) and manager of the Furriers Joint Council of New York. On March 1, 1948, the respondents caused petitioner to be arrested under a warrant issued by the Attorney General, alleging that petitioner was an alien subject to deportation under 8 U.S.C. section 137(g), which provides for the deportation of certain classes of aliens, including anarchists, aliens who advocate the violent overthrow of the government, etc. Upon direction of the Attorney General, petitioner was denied release upon bail pending the deportation hearing and was held in custody by the respondents. A hearing under the warrant of arrest was set for March 11, 1948, and then adjourned until April 1, 1948. In the interim, petitioner's attorney wrote the Immigration and Naturalization Service and requested that the deportation hearing be conducted before a presiding inspector designated, appointed and qualified in accordance with the Administrative

Procedure Act. On March 18, 1948, the Service denied this request and stated that deportation hearings were not controlled by the Administrative Procedure Act. (R. 22-30.)

The complaint further alleged that the deportation proceeding was required to be conducted in accordance with the provisions of the Administrative Procedure Act relating to administrative hearings, that the Immigration Service did not intend to comply with those provisions, that the deportation proceeding against petitioner would take two years or more, and that petitioner was suffering irreparable injury (R. 24-26). The complaint demanded injunctive relief and a declaratory judgment that the Administrative Procedure Act applies to petitioner's deportation hearing. (R. 26.)

The petitioner moved for a preliminary injunction (R. 30, 31). Affidavits filed in support of the motion in substance reiterated the allegations of the complaint, though in greater detail (R. 31-39). Petitioner's supporting affidavit added the further fact that on March 3, 1948, the District Court for the Southern District of New York enlarged him from custody pending his appeal from an order of that court dismissing his writ of habeas corpus (R. 31, 32).

On May 7, 1948, following a hearing, the District Court issued a preliminary injunction restraining the respondents, pending the action, from holding the hearing for the deportation of the petitioner or from deporting or attempting to deport him otherwise than in compliance with sections 5, 7, 8 and 11 of the Administrative Procedure Act (R. 39-41). The court entered findings of fact and conclusions of law, including the conclusion that the hearing for the deportation of the petitioner was subject to the cited sections of the Administrative Procedure Act (R. 40).

On August 3, 1948, the Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court for the Southern District of New York which had dismissed

petitioner's writ of habeas corpus, and remanded the case with the direction that the District Court determine whether the Attorney General had abused his discretion in refusing bail to the petitioner (R. 45). *U. S. ex rel. Potash* v. *District Director,* 169 F. (2d) 747. On December 6, 1948, the Attorney General released the petitioner on bail of $3,500, and by stipulation of the parties further hearings in the habeas corpus proceedings were indefinitely postponed (R. 45).

On October 12, 1948, the respondents moved in this case to dissolve the preliminary injunction and for summary judgment (R. 41-43). This motion stated that "there is no genuine issue as to any material fact" (R. 42). Petitioner filed a cross-motion for summary judgment (R. 43, 44). Following a hearing the court denied respondents' motion (R. 44), and granted petitioner's motion by issuing a judgment permanently enjoining the respondents in the same terms as the preliminary injunction (R. 44, 45).

The respondents filed a notice of appeal on March 25, 1949 (R. 46), and the case is now pending in the United States Court of Appeals for the District of Columbia. Argument before that court has not yet been scheduled.

Jurisdiction

The jurisdiction of this Court exists under 28 U. S. Code sec. 1254(1).

Questions Presented

(1) Whether deportation hearings are governed by the provisions of sections 5, 7, 8 and 11 of the Administrative Procedure Act relating to administrative hearings.

(2) Whether hearing officers in deportation proceedings must be examiners appointed and assigned under and as provided by section 11 of the Administrative Procedure Act.

Statutes Involved

Section 5 of the Administrative Procedure Act, 5 U. S. C. 1004, provides in part:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .
>
> (c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or initial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.

Section 7 of the Administrative Procedure Act, 5 U. S. C. 1006, provides in part:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section——
>
> (a) *Presiding Officers.* There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

Section 8 of the Administrative Procedure Act, 5 U. S. C. 1007, provides in part:

> In cases in which a hearing is required to be conducted in conformity with section 7——
>
> (a) *Action by Subordinates.* In cases in which the agency has not presided at the reception of the evidence, the officer who presided . . . shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision. . . .

Section 11 of the Administrative Procedure Act, 5 U. S. C. 1010, provides in part:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive

compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended. . . .

Section 16 of the Immigration Act of 1917, as amended, 8 U. S. C. 152, provides in part:

The inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Attorney General and under such regulations as he may prescribe. Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an oath has been administered, under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission, or readmission to, or to reside in the United States shall be deemed guilty of perjury and be punished as provided by section 231 of Title 18. All aliens coming to the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and

become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes enumerated in section 136 of this title. Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may, in the event of neglect or refusal to respond to a subpoena issued by any such district director or inspector in charge or refusal to testify before said immigrant inspector, issue an order requiring such person to appear before said immigrant inspector, produce books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. . . . Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this chapter, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation.

Reasons for Granting the Writ

The issue presented by this petition, whether deportation proceedings are subject to the requirements of the Administrative Procedure Act, presents highly important questions of federal law which have not been, but should be, settled by this Court. Two Courts of Appeals have decided these questions in a way which is in conflict with the intent and purposes of the Act. The public interest will be promoted by prompt settlement in this Court of the questions involved. This case presents the questions in a context of peculiar significance and clarity, and no purpose will be served by awaiting decision of the Court of Appeals, which has already passed on the issue in another case. Although petitioner has up to now fully prevailed in the litigation, he believes that the public welfare and considerations of justice to himself and others similarly situated require that this Court review his case at this juncture.

For these reasons, the Court should grant the writ at this time, without awaiting decision by the Court of Appeals. In what follows, we explain these reasons and the situation which underlies them.

I. Why the Issues Require Review

A. Importance of the Issues

No class of administrative adjudications surpasses deportation proceedings in importance. Numerically they are vast, averaging, on the statement of the Immigration and Naturalization Service, about 2,500 per month (R. 42). The policies they implement are significant and sensitive, with both domestic and international aspects. The individuals they involve face banishment and exile, the loss of liberty and fortune, and the uprooting of an established way of

life; only the most serious of criminal prosecutions have greater human stakes. *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391; *Bridges* v. *Wixon*, 326 U. S. 135, 147; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

In juxtaposition to these considerations must be placed the objectives of the Administrative Procedure Act. That Act was designed to bring into the vast welter of federal administrative processes a greater degree of order, uniformity and fairness.[1] Among its most fundamental reforms were provisions insulating hearing examiners from control and discipline by the prosecuting agency and from participation in investigative or prosecutorial functions.

If, then, deportation proceedings are exempted either from all the requirements of the Administrative Procedure Act or from the hearing examiner provisions, the only rational explanation must be that the conduct of the alien expulsion function has heretofore escaped the criticisms of administrative processes which fathered the Act. It is well known, however, that the administration of few federal functions has been condemned for so long a time, with greater severity—and with greater cause. From the Alien and Sedition Laws, through the Palmer raids, and to the present wave of expulsions of political dissidents, the character and use of the deportation process have been vehemently criticized.[2]

---

[1] See e. g., Sen. Rep. No. 752, 79th Cong., 1st Sess., 1-3, reporting out S. 7, which became the Act; foreword by Senator Pat McCarran, Chairman of the reporting Committee (Sen. Judiciary) to *Administrative Procedure Act—Legislative History*, Sen. Doc. 248, 79th Cong., 2d Sess., p. iii. The title of the Act is: "An Act to improve the administration of justice by prescribing fair administrative procedure."

[2] For a very recent statement on the subject, see Gerard D. Reilly (formerly Solicitor, Dept. of Labor, at a time when the Immigration Service was in that department), *The Sunday Star*, Wash., D. C., Aug. 8, 1948, p. C-4. In criticizing a holding that deportation proceedings are exempted from the Administrative Procedure Act, Mr. Reilly stated: "These bodies [SEC, FTC, NLRB, and other agencies regulating the conduct of businessmen], even in the days when they were believed to be most arbitrary,

To maintain that deportation proceedings are excepted from the Act is, therefore, to suggest a stultification of the Act. Nevertheless, the Immigration and Naturalization Service has ruled that the Act is inapplicable to such proceedings. If the Act is ultimately held applicable, the procedures of the Service (like that of numerous other federal agencies) will have to be extensively rationalized. Persons subject to deportation proceedings will be accorded the same procedural rights as businessmen appearing before regulatory agencies. Finally, such a holding will, by its interpretation of the Administrative Procedure Act, settle questions on coverage involving other agencies.

It is plain, therefore, that the issues herein presented are of a magnitude which presses for a determination by this Court, and the earlier the better. This circumstance has been recognized by the Solicitor General. In a memorandum filed by him in this Court on August 5, 1949, in a case involving the same legal questions as this case (*Wong Yang Sung* v. *Clark and Miller,* No. 154 of this term), the Solicitor General has stated that the government does not oppose the granting of certiorari in the *Sung* case because "the questions raised are of obvious importance in the administration of the immigration laws and an early authoritative decision seems desirable from every point of view."

B. Erroneous Rulings by Courts of Appeals

1. *Application of Section 7(a) of the Administrative Procedure Act*

Review by this Court of the issues involved is also necessary to correct erroneous rulings on the subject by two Courts of Appeals, which have held that deportation pro-

---

were models of administrative fairness as compared to immigration proceedings." See also Note, *Federal Administrative Procedure Act,* 56 Yale L.J. 670, 683, 684; *Enforcement of the Deportation Laws,* 5 National Commission on Law Observance (Wickersham Commission) (1931).

ceedings are exempted from the requirements of the Administrative Procedure Act. *Azzollini* v. *Watkins*, 172 F. (2d) 897 (C. A. 2); *Wong Yang Sung* v. *Clark & Miller*, App. D. C., April 4, 1949. In the latter of these cases, a petition for certiorari is pending in this Court.

These two decisions relied on the clause in section 7(a) of the Administrative Procedure Act that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." They interpreted section 16 of the Immigration Act of 1917 (8 U. S. C. sec. 152) as providing that deportation hearings are to be conducted by immigration inspectors, and thus making applicable the exemption quoted.

These cases rest on a triple misconception.

First, section 16 of the Immigration Act of 1917 (quoted in the Appendix hereto) does not authorize immigrant inspectors to conduct deportation hearings. Plainly enough, the section is addressed to the inspection of aliens arriving at the border, that is, to exclusion proceedings as distinguished from deportation proceedings. If immigrant inspectors are authorized to take evidence regarding the status of resident aliens who have theretofore been admitted after inspection, that authority is limited to investigations preceding the formal deportation hearing. It does not extend to the conducting of deportation hearings, which includes the making of the initial decision. This clearly appears not only from the context generally, but particularly from the circumstance that the only decision, preliminary or otherwise, which immigrant inspectors are authorized to make under the section is to admit an arriving alien or to detain an arriving alien for examination by a board of special inquiry. It is impossible that provision should be made for adjudications without any statement of

what judgments may be rendered. And while powers to investigate are often given without power to adjudicate, it is unheard of that a limited power to adjudicate should be greatly expanded by interpretation in order to match the investigative jurisdiction.

The fact is that the *Azzollini* and *Sung* decisions rest on an inexpert construction of the Immigration Act and an unfamiliarity with the different functions and proceedings of the Imigration Service.[3] It is significant in this respect that the Service itself has historically interpreted section 16, contrary to the *Azzollini* and *Sung* decisions, as applying only to exclusion proceedings and to the investigative, prehearing stage of deportation proceedings. Thus the following appears in an agency report of 1940 (*Report of the Secretary of Labor's Committee on Administrative Procedure (The Immigration and Naturalization Service)*, by Dimock, Hart, and McIntire, p. 66; emphasis added):

> *Basis of inquisitorial power*—Sweeping authority to question suspected aliens, *independently of any formal proceedings* against them, is conferred upon immigrant inspectors by Section 16 of the Act of 1917. . . . In the unsatisfactory fashion characteristic of the immigration statutes, however, this authorization appears in the middle of a long paragraph dealing primarily with procedure at the border, and some doubt may exist as to whether it refers to *inquiries* concerning the rights of other than entering aliens. The Department, however, has taken the view that it does, and we are satisfied that such a view is correct.

Only after the Immigration Service had failed to obtain judicial acceptance of a different and contradictory theory of its exemption from the Administrative Procedure Act did

---

[3] The same misconstruction of section 16 of the Immigration Act was applied in *Graham* v. *U. S.*, 99 F. (2d) 746.

it advance the proposal that the 7(a) exemption applied.[4]

But even if section 16 of the Immigration Act authorizes immigrant inspectors to conduct deportation hearings, nevertheless, the 7(a) exemption of the Administrative Procedure Act is not applicable. In this respect lies the second misconception of the *Azzollini* and *Sung* decisions.

The 7(a) exemption was intended only to preserve the status of specially qualified statutory officers. Obviously it is not brought into play by a statutory provision which authorizes the agency to assign employees generally to conduct hearings, since then the Act's provisions for hearing examiners would be completely eliminated. Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 364 (Congressman Walter), 268 (report of House Judiciary Committee); Attorney General's Manual on the Administrative Procedure Act (1947) 72; 58 Yale L. J. 701.

Immigrant inspectors, however, are not a special class of officers. No statute requires or contemplates their having special qualifications. Section 24 of the Immigration Act of 1917 (8 U. S. C. 109) simply authorizes them to be appointed by the Attorney General in exactly the same way and in the same text as all employees of the Immigration Service are appointed. An immigrant inspector is simply any employee who is assigned to the work of immigrant inspection. The situation is as if a statute provided that deportation hearings shall be conducted by such employees as the agency shall designate, who shall have the title of

---

[4] The first judicial determination of the applicability of the Act to the conduct of deportation hearings was the ruling granting a preliminary injunction in this case. At the hearing preceding this ruling, the respondents did not even suggest exemption under 7(a). Instead, they argued that the Immigration Acts are altogether silent as to deportation hearings, that therefore such hearings are not "required by statute" under section 5 of the Administrative Procedure Act, and hence are not within that Act's coverage. This theory of exemption had been enunciated by the Commissioner of Immigration and Naturalization as early as February 1947 (R. 29).

"immigrant inspectors." Obviously, such a provision would not, under the foregoing principles, lay the foundation for a 7(a) exception. By administrative regulation, all patrol inspectors, special inspectors, naturalization examiners, and employees of higher Civil Service grade in the Immigration and Naturalization Service, are "designated immigrant inspectors without additional compensation," in which capacity their work is not "to interfere substantially with the performance of the duties of the other positions." 8 C. F. R. 60.27. In fact, then, the agency, which is free to designate any employees to be immigrant inspectors, has designated all officers above a certain Civil Service grade. Immigrant inspectors, therefore, are neither by statutory requirement nor in practice a body of specially selected, specially qualified statutory officers. They are merely those employees whom the agency has assigned generally to the inspection function. Hence the 7(a) exemption does not apply.

Finally, even if the 7(a) exception did apply, it would, by its express terms, exempt the Service only from the need of utilizing special hearing examiners. It would not, as the *Azzollini* and *Sung* courts cavalierly assumed, exempt the conduct of the hearings from the numerous other requirements of the Administrative Procedure Act.

2. *Application of Section 5 of the Act*

Section 5 of the Administrative Procedure Act applies only "in every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing." Adjudication proceedings not within section 5 are not within the terms of section 7, 8 and 11, which deal with hearings, decisions, and examiners.

As already indicated, the respondents contend that no statute requires the holding of an agency hearing before an

adjudication of deportation, and conclude therefrom that deportation proceedings are not within the cited sections.

This Court has held, however, that the immigration statutes must, to save constitutionality, be construed to require a hearing on the record in deportation cases. *Japanese Immigrant Case,* 189 U. S. 86; *Kwock Jan Fat* v. *White,* 253 U. S. 454. Accordingly, the condition of coverage seems easily satisfied.

Even if it be elliptically considered that deportation hearings are required by the Constitution rather than by the immigration statutes as construed, nevertheless, such hearings must be considered to be "required by statute." A constitution is, of course, a statute; the words "constitution" and "statute" have the same etymological derivation; and there is ample precedent that "statute" in a federal enactment, including enactments relating to jurisdiction and procedure, includes "constitution." *AFL* v. *Watson,* 327 U. S. 582; *Phillips* v. *U. S.,* 312 U. S. 246; *Hamilton* v. *University,* 293 U. S. 245; *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 102, 103. *Cf. Atlantic Coast Line R. R.* v. *Goldsboro,* 232 U. S. 548, 555; *Griffen* v. *Cole,* 60 Ariz. 83, 87, 131 P. (2d) 989, 991.

Manifestly, it would be irrational to suppose that the Administrative Procedure Act contemplated for hearings required by the Constitution a status inferior to those required by Congressional enactment only. It is clear, too, from the legislative history of the Administrative Procedure Act that the inclusion in section 5 of the "required by statute" phrase was simply intended to eliminate from coverage petty adjudications in which hearings of one kind or another were provided by administrative grace as contrasted to those compelled by an authority superior to the agency, whether by an explicitly worded statute, or by a statute as construed, or by the Constitution. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 51 n. 9 (1946); Sen.

Doc. 248, 79th Cong., 2d Sess., pp. 22, 285; Note, 49 Col. L. Rev. 73, 75 (1949).

In *Bersoff* v. *Donaldson,* App. D. C., January 3, 1949, the court held, in a case presented under the postal fraud laws, that the section 5 phrase applied only where a statute explicitly required a hearing, and not where it was merely construed to require a hearing. The *Bersoff* holding, however, was predicated on an inadequate presentation of the issues, is without any basis in logic, and is contrary to the legislative background of the Act. As the House Judiciary Committee commented in reporting the bill, "A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention to so require, and in either situation sections 7 and 8 would apply save as other exceptions are operative." Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 285, n. 9. Finally, the *Bersoff* decision is inconsistent with cases interpreting section 10 of the Act. This section provides for an exception when "statutes preclude judicial review." The exception is held to apply whether the statutory preclusion is explicit or is present through judicial construction only. *U. S. ex rel, Trinler* v. *Carusi,* 166 F. (2d) 457 (C. C. A. 3), *Kirkland* v. *Atlantic Coast Line R. Co.,* 167 F. (2d) 529 (App. D. C.).

II. Why the Issues Should Be Reviewed in This Case Prior to Decision of the Court of Appeals

The foregoing already sufficiently establishes that it is in the public interest for this Court to decide the issues herein at the earliest possible date. It is apparent, too, that no purpose would be served by awaiting a decision herein by the Court of Appeals, since its recent decision in the *Sung* case clearly applies to the present case. This

fact is recognized in the Solicitor General's memorandum, already referred to, in the *Sung* case, which states (pp. 3, 4), that the present case "must be taken to have been overruled" by the *Sung* decision. A decision of this case by the Court of Appeals would not, it is clear, be handed down in time to permit review by this Court in the present term.

The *Sung* petition for certiorari presents to this Court the same legal issues as does this petition. We suggest that the Court should grant both petitions. In the *Sung* case, the decision below rested on section 7(a). In this case, the decision rested on section 5. The ultimate decision, in our view clearly requires consideration of both sections.

This case, too, was the first in which the issues were presented for judicial determination. Above all, it presents the fundamental question—whether deportation proceedings must comply with the fair standards required of other agencies—in its most important application. Here the use of the deportation process was invoked under 8 U. S. C. sec. 137. That section has been used to expel aliens who have unpopular views, regardless of strict requirements of proof,[5] and to prevent the alien community generally from exercising the liberties granted by the First Amendment. In deportation proceedings under this section, complicated questions of law and fact are involved concerning the admissibility of evidence, the interpretation of documents, and the extent of cross-examination of government witnesses. Especially in cases of this character an impartial and competent hearing examiner is required to pass upon the difficult issues. "Immigrant inspectors"

---

[5] Many members of the IWW were deported between 1918, when deportation for membership in that organization was upheld (*Ex parte Bernat*, 255 F. 429), and 1941, when that organization was finally given clearance in the second deportation proceeding against Harry Bridges (Record, pp. 329-336, in *Bridges* v. *Wixon*, 326 U. S. 135).

are not qualified for such a task, and their views are under the domination and control of the Attorney General, whose views as to the proscribed character of various organizations have been formally established by his listings under the federal employees' loyalty program and are otherwise generally widely publicized. Finally, the Immigration Service has been using the same inspectors in its local offices over and over again in cases of this character,[6] so that the presiding inspector is being asked to pass on an issue on which he has already made up his mind on a previous occasion on a different record. The need for rotation of hearing examiners as provided in the Administrative Procedure Act is especially appropriate and necessary so as to insure due process of law.

---

[6] In the New York District, which handles the bulk of these cases, the Service has informed us that only two inspectors have been used as presiding inspectors in the cases involving charges under 8 U.S.C. 137 since Mr. Shaughnessy became District Director in March 1949.

Conclusion

The writ of certiorari should be granted, and the judgment of the District Court should be affirmed.

Respectfully submitted,

LEE PRESSMAN,
9 East 40th Street,
New York, N. Y.;
JOSEPH FORER,
DAVID REIN,
711 Fourteenth St., N. W.,
Washington, D. C.;
CAROL KING,
220 Broadway,
New York, N. Y.;
ISIDORE ENGLANDER,
205 E. 42nd St.,
New York, N. Y.;
DAVID FREEDMAN,
100 Fifth Avenue,
New York, N. Y.;
IRA GOLLOBIN,
1441 Broadway,
New York, N. Y.;
WILLIAM L. STANDARD,
291 Broadway,
New York, New York,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 366

IRVING POTASH, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari asks the Court to review a civil case pending on appeal in the Court of Appeals for the District of Columbia Circuit prior to rendition of judgment by that court, as authorized by 28 U. S. C. 1254 (1). Respondents oppose the granting of the petition on the ground that this is not a case warranting such "extraordinary" action (*Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; cf. *United States* v. *Mine Workers,* 330 U. S. 258, 269; *Ex parte Quirin,* 317 U. S. 1, 19–20).

860673—49

This proceeding arose with the filing by petitioner and others in the District Court for the District of Columbia, on March 22, 1948, of a petition for a declaratory judgment declaring that deportation proceedings are required to be conducted in accordance with the provisions of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, *et seq.*, and for an injunction restraining respondents and their subordinates from proceeding with deportation proceedings, previously instituted against the complainants, otherwise than in accordance with the provisions of that Act (R. 22–27). On May 7, 1948, the District Court (Goldsborough, D. J.) issued a preliminary injunction as prayed in the petition (R. 39–41), and on February 17, 1949, a permanent injunction was issued (R. 44–45). Respondents appealed from this order to the Court of Appeals for the District of Columbia Circuit (R. 46), where the appeal is now pending.

The issue presented by the instant petition for certiorari is, as recognized by petitioner (Pet. 11, 18), the same as that presented in No. 154, *Wong Yang Sung, Petitioner* v. *J. Howard McGrath, Attorney General of the United States, and Watson B. Miller, United States Commissioner of Immigration and Naturalization Service,* now pending on writ of certiorari to the Court of Appeals for the District of Columbia Circuit, i. e., whether deportation proceedings are governed by

the Administrative Procedure Act.[1] The decision of this Court in the *Wong Yang Sung* case will thus be dispositive of the issue raised by the instant petition. It is true that an early determination of the question by this Court is desirable, as urged by petitioner (Pet. 11) and as we stated in our memorandum concurring in the petition for certiorari in the *Wong Yang Sung* case. But since the issue is already before the Court in the latter case, decision of this question will not be further expedited by the granting of certiorari in the present case before judgment of the Court of Appeals, as requested by petitioner. Petitioner is not in custody in connection with the deportation proceedings, and he advances no sound reason why the normal processes of appellate review should not be adhered to in his case. Petitioner urges that the decision below in this case rested upon Section 5 of the Administrative Procedure Act, while the decision below in the *Wong Yang Sung* case is based upon Section 7. The Government expects to contend that both sections support the decision below in

[1] This is also the issue presented in No. 213, *United States of America ex rel. Lee Wo Shing, Petitioner* v. *Edward J. Shaughnessy, Acting District Director of the Immigration and Naturalization Service in the New York District, etc.*, now pending on petition for a writ of certiorari to the Court of Appeals for the Second Circuit. In the latter case, we filed a memorandum suggesting that the Court enter an appropriate order in the light of the decision to be reached in the *Wong Yang Sung* case.

the latter case, thereby presenting the entire problem to this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949